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IN THE

Supreme Court of the United States

October Term, 1983

No.

ORVIL T. BRASWELL and
PARLEE K. BRASWELL, et al., Petitioners,

v.

FLINTKOTE MINES LTD., et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Introductory Statement

Petitioners/Plaintiffs (fourteen in number) brought diversity product liability actions for asbestos-related diseases from asbestos exposure in their work place, against the manufacturer-suppliers. The cases below were disposed of by summary judgment in favor of defendants based on Indiana statutes of limitation after deciding, without clear precedent, when an action "accrues" in Indiana. The Court of Appeals for the Seventh Circuit affirmed the trial court 2-1, with a vigorous dissent.

QUESTIONS PRESENTED

1. Should this Court now require or encourage, in the interest of judicial economy, federal courts to remand controlling questions of state law to the appropriate state courts where such procedure is allowed by state law. Herein, did the Court of Appeals for the Seventh Circuit err by failing to certify the controlling question of Indiana law to the Indiana Supreme Court, when there was no Indiana law directly on point?

2. Should the United States Supreme Court certify to the Indiana Supreme Court the question: When does a products liability action against a manufacturer of asbestos for asbestosis caused by exposure to the manufacturer's product accrue under (1) Indiana's tort statute of limitations, Ind. Code Sec. 34-1-2-2, and (2) Indiana's products liability statute of limitations, Ind. Code Sec. 33-1-1.5-5?

3. Are Petitioners' rights to due process and equal protection, as guaranteed by the Fourteenth Amendment of the United States Constitution, violated by Indiana's applicable statute of repose? There is a division among the States and Federal courts on this question of federal constitutional law.

4. Did the Court of Appeals for the Seventh Circuit

erroneously interpret Indiana law regarding accrual of action date, erroneously creating new Indiana law thereby, and erroneously holding Petitioners' actions barred by the statute of limitations/repose?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners/Plaintiffs below are individuals as follows:

Orvil T. Braswell and Parlee K. Braswell
William M. Baker and Phyllis J. Baker
Omer T. Rogers and Opal B. Rogers
Helen M. Igo and Boyd Melvin Igo
Robert E. Godfrey and Thelma Godfrey
James T. Clapp and Betty M. Clapp
Obert F. Moore and Gladys Moore

The Respondents/Defendants are all corporations, as follows:

Flintkote Mines, Ltd.
GAF Corporation
Raybestos-Manhatten, Inc.
The Celotex Corporation
Asbestos Corporation, Ltd.
Bell Asbestos Mines, Ltd.
National Gypsum Company
The Flintkote Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Orvil T. Braswell and Parlee K. Braswell, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 6, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto, and is reported as *Braswell v. Flintkote Mines, Ltd.*, 723 F2d 527 (1983). The United States District Court for the Southern District of Indiana entered separate findings of fact, conclusions of law and judgments on behalf of each defendant against each plaintiff and spouse below.

These comprise 266 pages and do not appear in the Appendix as the opinion of the Court of Appeals succinctly summarizes the issues.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 6, 1983. A timely Petition for Rehearing was denied on January 16, 1984, and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of the United States Supreme Court to review this decision is conferred by 28 U.S.C. Sec. 1254(1). 28 U.S.C. Sec. 2403(b) may be applicable. No court has certified to the Indiana Attorney General that the constitutionality of Ind. Code 33-1-1.5-5 was drawn in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

Indiana Code 33-1-1.5-5 reads as follows:

> "Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues."

Indiana Code 34-1-2-2 reads as follows:

> "*Limitation of actions—Two, five, six, ten and twenty years.*—The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards:
>
> (1) For injuries to person or character, "for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years."

STATEMENT OF THE CASE

The Court of Appeals' majority opinion aptly states the case: "This consolidated appeal involves seven plaintiffs who were employed by the World Bestos Division of the Firestone Tire and Rubber Company at its plant in New Castle, Indiana. Plaintiffs and their spouses have filed claims for damages based upon exposure to asbestos manufactured or supplied by the defendants. Each of the plaintiff-employees seeks damages for asbestosis, and their spouses claim lack of consortium. The workers were employed at jobs which exposed them to asbestos fiber in varying degrees and amounts over varying lengths of time. The first plaintiff to be exposed (Obert F. Moore) was initially exposed to the asbestos fibers in 1943, and no plaintiff was initially exposed later than 1964.

"The first of the seven diversity actions was commenced by Orvil T. Braswell on November 30, 1979, against the several defendants which allegedly furnished or manufactured asbestos for the World Bestos plant. Braswell was employed at the plant from 1950 until 1975, at which time his exposure to asbestos ceased. He apparently first noticed symptoms of his condition in 1972 and was informed by his physician in late 1979 that he had an asbestos-related disease.

"The other six actions were commenced by plaintiffs between January and July of 1981. Exposure to asbestos manufactured by at least one of the defendants with respect to these six plaintiffs ceased in the following years: 1963

(James T. Clapp), 1969 (Omer T. Rogers), 1974 (William M. Baker), 1979 (Helen M. Igo), 1979 (Robert E. Godfrey). Like Braswell, none of the other plaintiffs filed their complaints within two years of their most recent exposure to asbestos. The parties dispute at what time these plaintiffs were first cognizant of their conditions and, as to some plaintiffs, when they were first diagnosed by a physician to have an asbestos-related disease.

"The trial court in these consolidated actions granted summary judgment in favor of defendants on the ground that plaintiffs' actions were time-barred by Indiana statutes of limitations. Additionally, the court granted motions to dismiss for lack of in personam jurisdiction in favor of defendants Bell Asbestos Mines, Ltd. and Flintkote Mines, Ltd. The court also granted summary judgment in favor of Raybestos-Manhattan, Inc. on all product liability counts on the ground that the defendant was not engaged in the business of selling asbestos. Defendant Lake Asbestos of Quebec, Ltd. has settled with the plaintiffs during the pendency of this appeal."

REASONS FOR GRANTING THE WRIT

Briefly stated, Petitioners' actions are saved in part against the statute of limitations if actions accrue when the damage is "ascertainable", or "manifests itself", or under a "discovery rule". Petitioners' suits were brought within two years of any of these dates, by Petitioners' view of the evidence.

This case presents an opportunity for the Court to require or encourage the use of certification provisions most States now have to answer unclear questions of state law, thereby enhancing both judicial/litigant economy and certainty. The threshold question below was when did the Petitioners' cause "accrue" under Indiana law. Petitioners believe an action accrues when damage is ascertainable or discernible, and argued Indiana might adopt a discovery rule. Respondents argued accrual occurred at ingestion of

the asbestos fibers, or at termination of exposure at the latest. No Indiana case addresses the question clearly; the Indiana Supreme Court has neither accepted nor rejected the "discovery rule". The Court of Appeals' majority opinion acknowledged the lack of explicit ruling on the question, but still decided the crucial issue, relying upon *Shideler v. Dwyer*, 417 NE2d 281 (Ind. 1981). *Shideler v. Dwyer* was a legal malpractice case with a divided Indiana Supreme Court (3-2) and a strong dissent. It has been well criticized. MacGill, R.D., "Note: *Shideler v. Dwyer*: The Beginning of Protective Legal Malpractice Actions," 14 Indiana Law Review 927 (1981). The Court of Appeals made new Indiana law with its decision. Indiana has a certification procedure (Ind. Code 33-2-4-1; Ind. Rule App. Pro. 15 (O)), and has promptly responded to a previous request from the Court of Appeals. *Dague v. Piper Aircraft Corp.*, 418 NE2d 207 (Ind. 1981).

This Court has approved the certification procedure. As more states provide for certification, (see Appendix), certainty and economy for both litigant and court will be ultimately advanced by required usage. Petitioners ask the Court to use this case as the vehicle to require certification.

In *Elkins v. Moreau*, 98 S Ct. 1338, 1347 (1978), this Court certified a question of state law to the Court of Appeals of Maryland, reasoning Maryland had a great interest in the question and that the question affected many Maryland citizens. Here, Indiana is home to large numbers of persons injured by products whose damages do not usually manifest themselves for many years, i.e., asbestos, DES, Agent Orange, and a host of other latent disease causes which are growing to be known as "Toxic Torts". Indiana has a strong State interest in deciding whether or not these persons are compensated by the manufacturer, or supported through State paid social programs. Conversely, Indiana has a strong interest in providing a good business economic environment to retain or entice businesses within its borders, which business climate is invariably argued as

affected by decisions about limitation of actions. Thus, there is solid ground for this Court to certify the accrual question to the Indiana Supreme Court, under *Elkins v. Moreus*.

The "accrual" question need be answered to analyze the constitutional issues raised below. If Indiana actions accrue at either discovery or manifestation of damage, Petitioners' equal protection and due process complaints are narrowed to application of the repose provision in the statute of limitations as the statute would then provide some reasonable period of time for bringing a claim. Certification of the accrual question to the Indiana Supreme Court is appropriate and necessary if Indiana is to determine its own accrual dates.

Earlier herein Petitioners indicated their actions would be saved in part against the statute of limitation, having filed within two years of the time their asbestos disease manifested itself or was ascertainable or was discovered. But in June 1978, Indiana's Product Liability Act became effective, adding a "ten-year from initial date of delivery" repose provision to the two-year from accrual limitation. By limiting Petitioners' claims to asbestos exposure only in the last ten years, a full or effective remedy is denied.

The highest courts of five states have held similar product liability repose provisions unconstitutional, using equal protection and/or due process reasoning under provisions of their state Constitutions and the Fourteenth Amendment to the United States Contitution. See *Kennedy v. Cumberland Engineering Co., Inc.*, 471 A2d 195 (R.I. 1984); *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 1003-04 (Ala. 1982) (ten-year statute void under Ala. Const. art. I, Sec. 13); *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874, 874 (Fla. 1980) (relying upon *Overland Const. Co., Inc. v. Sirmons*, 369 So.2d 572 (Fla. 1979) (twelve-year statute void under Fla. Const. art. I, Sec. 21); *Bolick v. American Barmag Corp.*, 54 N.C.App. 589, 592-95, 284 S.E.2d 188, 191-92 (1981), modified and aff'd, 306 N.C. 364,

293 S.E.2d 415 (1982) (six-year statute void under N.C. Const. art. I, Sec. 18); *Heath v. Sears, Roebuck & Co.*, 464 A2d 288 (N.H. 1983).

The Indiana statute was held constitutional by the Court of Appeals for the Seventh Circuit in this case and in *Pitts v. Unarco Industries, Inc.*, 712 F2d276 (7th Cir.1983, Cert. Den. 11/28/83) on due process and equal protection grounds. Accrual in *Pitts* was date of death, and at issue was the ten-year repose provision of the statute. Other federal courts have rejected challenges to ten-year repose provisions in similar legislation. See *Mathis v. Eli Lilly & Co.*, 719 Fed.2d 134 (6th Cir. 1983).

There is then a conflict between the states and Federal courts, with due process and equal protection being interpreted differently.

As the constitutional analysis often refers back to the purpose of the statute or the problem it addresses, the repose provision gives difficulty here. There is no legislative history to refer to in an attempt to understand the purpose of Indiana's repose provision. The Indiana Supreme Court, in holding it constitutional, did not perceive the commonly raised "product liability insurance crisis" as its purpose. *Dague v. Piper Aircraft Corp.*, supra. No help is found in a preamble or introduction to the statute—none exists. Indiana Acts of 1978, Vol. II, P.L. 141, p. 1298. Indiana had adopted strict liability by case law previously, and the statute codified this and added defenses. The purpose, by guestimate, is either to provide a liability cutoff after the reasonable life expectancy in a product, or to merely bring certainty to all product manufacturers—be they purveyors of potato salad whose life is counted in hours, or major equipment makers whose machines serve decades.

On Equal Protection analysis, the statute creates two classes of plaintiffs: those whose injury and manifestation of the injury is within ten (10) years of product delivery,

and, those, such as these Petitioners, whose injury occurred over the ten-year period after product delivery but which manifests many years later. In other words, slow injuries and fast injuries are treated unequally.

There is also made an unreasonable and arbitrary distinction among manufacturers, the protected class. Manufacturers and sellers of long-life and use products may be insulated from liability while manufacturers and sellers of short-life and use products are at risk. The statute makes the classification into which a manufacturer may fall a matter of chance, depriving some the protection granted others. *Reed v. Reed*, 404 U.S. 71 (1971). The statute likewise classifies all products alike.

Since a claim cannot reasonably be stale until some time after it accrues, the two-year from accrual portion of the statute prevents the filing of "stale claims". So the ten-year provision does not rationally serve any purpose other than setting an arbitrary product liability life. Thus it is well stated:

> "A manufacturer should be required to produce a product that can be safely used during the period of its intended use, not for some arbitrary period of time that is applied to all products. A statute that would take into account the period of the product's intended use would not favor some groups of manufacturers to the exclusion of others, nor would it be unfair to injured individuals." Comment, *Alabama's Products Liability Statute of Repose*, 11 Cum. L. Rev. 163, 180 (1980).

The classifications created by this statute are capricious, because the nature of the injury and not the fact of injury determines whether or not a suit will be permitted. *Urie v. Thompson*, 337 U.S. 163 (1949). Further, the statute of repose is arbitrary in its complete elimination of rights prior to the time the cause of action could reasonably have accrued. *United States v. Kubrick*, 444 US 111. Certainly, the protected class of manufacturers are not given equal

treatment or protection, and the consumers are treated differently from each other, depending upon chance.

On substantive Due Process grounds, the repose provision is proved unreasonable, arbitrary and capricious, and with means having no real and substantial relation to the object sought. It may be defective on due process grounds merely in its effect on the injured when compared with the fact that there is no demonstrable object sought by the legislation, leaving no balancing effect at all. As case law makes clear, asbestos-related diseases have a prolonged latent period between exposure and manifestation. See *I.N.A. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 686 (1981); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975); and *Borel v. Fibreboard Paper Products*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 869 (1974).

The ten-year period provided has no relationship to a fiber which never wears out and which slowly poisons an individual over a prolonged period of time. There is no basis for asserting, as the statute asserts in its application, that asbestos is rendered less toxic by the passage of time. Toxic chemicals and materials do not wear out.

As the repose provision creates a flat period of liability life, it violates substantive due process in the most fundamental sense. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). See also *Vlandis v. Kline*, 412 U.S. 441 (1973); *Leary v. U.S.*, 395 U.S. 6 (1969); and *Schelesinger v. Wisconsin*, 270 U.S. 230 (1926).

We respectfully urge the Court to carefully consider how arbitrary the ten-year limitation is when applied to the product whose damage usually is not manifested for twenty to forty years, as here. Where is a rational relationship between asbestos fibers, their useful life, or the period of time it takes for the damage they do to mature? The ten-year period is capricious to these workers who cannot and

do not know of even their injury, let alone its cause or their rights, until long after the cutoff.

Nor is setting a definite time limit for liability a permissible legislative goal when balanced on the scales of substantive due process and the rights of the injured in these and future cases of delayed harm product liability.

Petitioners believe substantive due process and equal protection require product repose statutes to be based on the useful and expected life of the product.

In upholding Indiana's ten-year repose provision, the Court of Appeals relied by rote upon an out of context quote on the policy of the law as expressed in *United States v. Kubrick*, 444 U.S. 111,117. No mention or discussion was made of the difference between a statute of limitations (X time from accrual) and statutes of repose, which tie liability exposure to no act or date relating to the injury.

The Court should accept this case and render an opinion on these issues for five reasons:

1. The large and quickly growing number of injuries caused by chemicals, drugs and other man-made substances, which injuries and/or diseases are not manifested for years longer than ever before in our history. Perhaps a natural consequence of the knowledge explosion since 1945. Toxic torts need to be addressed, beginning with constitutional fundamentals.

2. The constitutional guidelines for repose are in conflict between state and federal jurisdictions. As all courts wrestle with high technology induced litigation on hazardous waste, toxic torts, and other delayed damage settings, clear guidance on basic principals will help provide uniform justice, end forum shopping, and bring predictability and certainty to a new, growing and confused area of law.

3. The opinions of the Court of Appeals on this issue has been conclusionary and scant of analysis.

While counsel here runs the risk of complaining both that the food tasted bad and that there was not enough of it, there is a dearth of analysis. The full extent of Petitioners' arguments should not be forgotten with a mere statement that other courts have found similar statutes constitutional because the same arguments may not have been made at all. The Court of Appeals relied upon its previous decision in *Pitts v. Unarco Industries, Inc.*, 712 F2d 280, for the concept the court has no business instructing the Indiana Legislature as to who should bear the risk of loss. The real constitutional question of what parameters exist in substantive due process to limit the Indiana Legislature and application of those parameters to the facts at hand was not discussed. *Martinez v. State of Cal.*, 100 S.Ct. 553, 444 US 277, 62 L Ed2d 481, reh. den. 100 S.Ct. 1285, 445 US 920, 63 L Ed2d 606. Indiana's regulation of its tort law cannot be arbitrary or irrational. *Mathis v. Eli Lilly & Co.*, supra, did not discuss equal protection.

4. These Petitioners and many many others, have been denied an opportunity to bring their case on the merits to trial through no fault of their own, having had no way to know of their damage until long past their asbestos exposure. *United States v. Kubrick*, supra and *Urie v. Thompson*, supra, deserve to be raised to constitutional question status.

5. Lastly, the Court of Appeals decision and result is absurd, as aptly stated in the dissent. For example, the Court of Appeals opinion literally mandates lawyers to advise clients exposed to almost any possibly harmful substance to file suit and then delay the case as long as possible, awaiting the manifestation of damage. This approach to justice will clog the courts even further, and cause needless expense to defendants and claimants alike.

The Court of Appeals majority opinion was mistaken in its interpretation of when an action accrues in Indiana, as is well pointed out by the dissent. In fact, Indiana requires the damage to be ascertainable. Not the extent of damage, but the fact of damage. A proper statement of Indiana law, and showing how Indiana really interprets *Shideler v. Dwyer*, supra, is found in *Monsanto v. Miller*, 455 NE2d 392 (Ind. App. 1983), a product liability case:

> "Both Ind. Code 33-1-1.5-5 and Ind. Code 34-1-2-1 are accrual statutes; therefore, the date Miller's cause of action became ripe will determine which statute applies here. Both statutes begin to run when a complete cause of action has accrued or when a person becomes liable to an action. *Babson Bros. Co. v. Tipstar*, (1983) Ind. App., 446 N.E. 2d 11. A cause of action accrues when an injury, wrongfully inflicted, causes damage. *Scates v. State*, (1978) 178 Ind. App., 624, 383 N.E. 2d 491. It is not necessary that the extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred. *Shideler, supra*. Failure to discover a right to bring suit does not operate to suspend the statute of limitations. *Fidelity and Casualty Company of New York v. Jasper Furniture Company*, (1917) 186 Ind. 566, 117 N.E. 258; *French v. Hickman Moving & Storage*, (1980) Ind. App., 400 N.E. 2d 1384. Likewise, no new cause of action will accrue when consequential damages arise from a prior injury and damage too slight to be noticed when inflicted. *City of North Vernon v. Voegler*, (1885) 103 Ind. 314, 2 N.E. 821; *Schmidt v. Merchants Dispatch Transp. Co.*, (1936) 270 N.Y. 287, 200 N.E. 824.

This issue is of course critical to the Petitioners' position. In the face of *United States v. Kubrick*, supra and *Urie v. Thompson*, supra, does substantive due process require opportunity for knowledge of injury to a claimant before his action accrues and the statute of limitations begins to run? If so, Indiana is arbitrary and irrational in the repose provision, and its failure to embrace the accrual at

discovery rule. Both through mistaken interpretation of Indiana law and constitutional analysis, the Court of Appeals was wrong, and Petitioners' causes of action dismissed as the result.

CONCLUSION

Justice requires that these seriously injured citizens, whose injuries were caused by exposure to asbestos many years ago, have the merits of their claims determined. They could not bring suit until their injuries were known, yet they did not know until after the statute of limitations had expired, according to the Seventh Circuit's interpretation of Indiana law. As Justice Swygert said "This result is a mockery of justice". The Court of last resort should not allow this result.

For all these reasons a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

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Opinion and Judgment of Court of Appeals A-1

Order of Court of Appeals denying Petition for Rehearing A-21

Tabulation of States with Certification Statute A-22

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-2699, 82-2702, 82-2703, 82-2704, 82-2705, 82-2727, 82-2728, 82-2729, 82-2730, 82-2731, 82-2732 and 82-2733

ORVIL T. BRASWELL and PARLEE K. BRASWELL, et al.,

Plaintiffs-Appellants,

v.

FLINTKOTE MINES, LTD., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. 79 C 996, 81 C 71, 306, 363, 722, 162 and 369
Cale J. Holder, *Judge.*

ARGUED SEPTEMBER 23, 1983—DECIDED DECEMBER 6, 1983

Before CUMMINGS, *Chief Judge*, SWYGERT and POSNER, *Circuit Judges.*

CUMMINGS, *Chief Judge.* This consolidated appeal involves seven plaintiffs who were employed by the World Bestos Division of the Firestone Tire and Rubber Company at its plant in New Castle, Indiana. Plaintiffs and their spouses have filed claims for damages based upon exposure to asbestos manufactured or supplied by the defendants. Each of the plaintiff-employees seeks damages for asbestosis, and their spouses claim lack of

consortium. The workers were employed at jobs which exposed them to asbestos fiber in varying degrees and amounts over varying lengths of time. The first plaintiff to be exposed (Obert F. Moore) was initially exposed to the asbestos fibers in 1943, and no plaintiff was initially exposed later than 1964.

The first of the seven diversity actions was commenced by Orvil T. Braswell on November 30, 1979, against the several defendants which allegedly furnished or manufactured asbestos for the World Bestos plant. Braswell was employed at the plant from 1950 until 1975, at which time his exposure to asbestos ceased. He apparently first noticed symptoms of his condition in 1972 and was informed by his physician in late 1979 that he had an asbestos-related disease.

The other six actions were commenced by plaintiffs between January and July of 1981. Exposure to asbestos manufactured by at least one of the defendants with respect to these six plaintiffs ceased in the following years: 1963 (James T. Clapp), 1969 (Omer T. Rogers), 1974 (William M. Baker), 1979 (Helen M. Igo), 1979 (Robert E. Godfrey). Like Braswell, none of the other plaintiffs filed their complaints within two years of their most recent exposure to asbestos.[1] The parties dispute at

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[1] Only plaintiffs Igo and Godfrey came close to filing within two years of their most recent exposure. Helen Igo filed on April 14, 1981; as the trial court found, shipments of asbestos from defendants Raybestos-Manhattan, Inc. and Asbestos Corporation, Ltd., which were the most recent shipments to the World Bestos plant, could not have contaminated Ms. Igo later than December 31, 1978, and April 13, 1979, respectively. (App. 125, 138). In regard to Robert Godfrey, who filed on July 2, 1981, the trial court found no contamination was possible from Raybestos-Manhattan asbestos after December 31, 1978, nor from Asbestos Corporation asbestos after July 1, 1979. (App. 164, 174). Plaintiffs do not challenge the accuracy of these trial court findings.

what time these plaintiffs were first cognizant of their conditions and, as to some plaintiffs, when they were first diagnosed by a physician to have an asbestos-related disease.

The trial court in these consolidated actions granted summary judgment in favor of defendants on the ground that plaintiffs' actions were time-barred by Indiana statutes of limitations. Additionally, the court granted motions to dismiss for lack of in personam jurisdiction in favor of defendants Bell Asbestos Mines, Ltd. and Flintkote Mines, Ltd. The court also granted summary judgment in favor of Raybestos-Manhattan, Inc. on all product liability counts on the ground that the defendant was not engaged in the business of selling asbestos. Defendant Lake Asbestos of Quebec, Ltd. has settled with the plaintiffs during the pendency of this appeal.

I

Plaintiffs argue that the statute of limitations in Indiana's Product Liability Act, Ind. Code § 33-1-1.5-5 (1981), violates plaintiffs' due process rights guaranteed by the Fourteenth Amendment. Section 33-1-1.5-5 states:

> Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Thus § 33-1-1.5-5 provides for a two-year statute of limitations, limited by a ten-years-from-delivery clause.[2]

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[2] The Supreme Court of Indiana in *Dague* v. *Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981) reasonably interpreted the

(Footnote continued on following page)

As an initial matter, it should be noted that prior to June 1, 1978, the date of enactment of § 33-1-1.5-5, the Indiana statute of limitations applicable in these types of actions was Ind. Code § 34-1-2-2 (1976), which states that actions "[f]or injuries to person [shall be brought] within two years . . . ." Plaintiffs on appeal have not directly challenged the constitutionality of § 34-1-2-2, yet § 34-1-2-2 was invoked by the district court as the basis for granting summary judgment in favor of defendants on most claims. Under the district court's analysis, each plaintiff's cause of action accrued when the plaintiff was last exposed to asbestos from a particular manufacturer or supplier. Since five of the seven exposed plaintiffs were last exposed prior to June 1, 1978, the enactment date of § 33-1-1.5-5, the trial court reasonably concluded that Ind. Code § 34-1-2-2 should apply to these plaintiffs. Section 33-1-1.5-5 bars only those actions of two plaintiffs against defendants who supplied asbestos which contaminated those plaintiffs after June 1, 1978.[3] Since, as discussed *infra*, this Court concurs in the trial court's holding that accrual occurs no later than at the time of the most recent exposure, the constitutional challenge to § 33-1-1.5-5 alone does not impact most of the plaintiffs' claims herein for § 34-1-2-2 must also be considered.

Plaintiffs' contention that Ind. Code § 33-1-1.5-5 violates due process cannot be accepted. The policy behind statutes of limitations was recently articulated in *United States* v. *Kubrick*, 444 U.S. 111, 117, in which the constitu-

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[2] *continued*
ten-year clause to require that the action be brought within two years after it accrues, but in any event within ten years after the product is first delivered, unless the action accrues more than eight but less than ten years after delivery.

[3] The trial court also noted that, in regard to several defendants whose deliveries of asbestos ceased in the 1960's, the ten-years-from-delivery clause of § 33-1-1.5-5 would bar the actions if § 33-1-1.5-5 were to be applied.

tionality of a two-year federal statute of limitations was upheld:

> Statutes of limitations which "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States* v. *Marion*, 404 U.S. 307, 322, n.14 (1971); *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, K. & T. R. Co.* v. *Harriman*, 227 U.S. 657, 672 (1913); *Bell* v. *Morrison*, 1 Pet. 351, 360 (1828).
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> Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell* v. *Haverhill*, 155 U.S. 610, 617 (1895); *Bell* v. *Morrison*, *supra*, 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938).

This Court finds Indiana's Product Liability Act, Ind. Code § 33-1-1.5-5 to be consistent with the above-stated policies which support statutes of limitations. This finding

echoes that in *Pitts* v. *Unarco Industries, Inc.*, 712 F.2d 276 (7th Cir. 1983), in which this Court rejected a due process challenge to this very statute by a representative of an asbestosis victim. We discern no justifiable grounds upon which to disturb our prior holding. See also *Scalf* v. *Berkel, Inc.*, 448 N.E.2d 1201 (Ind. App. 1983) (Court of Appeals of Indiana finding that § 33-1-1.5-5 is rationally related to a legitimate state purpose).

The Sixth Circuit in *Mathis* v. *Eli Lilly & Co.*, No. 81-5803 (6th Cir. Oct. 7, 1983), held that a Tennessee statute of limitations that bars product liability actions brought more than ten years after the product was purchased does not violate due process, even though it may operate to extinguish some claims before injury actually becomes manifest. Similar to the ten-years-from delivery clause of Ind. Code § 33-1-1.5-5, the statute at issue in *Mathis*, Tenn. Code § 29-28-103 (1979) imposed with some exceptions a ten-year limit on bringing actions against manufacturers and sellers dating from the time the product was "first purchased for use . . . ."[4] The plaintiff sought damages for personal injury due to her in utero exposure to diethylstilbestoral (DES), a drug developed as a synthetic hormone to prevent miscarriages. Plaintiff alleged that her mother took DES in 1955, without knowledge that the drug might cause cancer in her offspring. Further, she alleged that she did not know she had developed cancer of the cervix until 1980. The trial court held that the action was barred by the Tennessee statute, and the Sixth Circuit affirmed, rejecting plain-

[4] Unlike the Indiana Legislature, the Tennessee Legislature specifically exempted actions resulting from exposure to asbestos from the ten-year limitation. Tenn. Code § 29-28-103(b) (1979). The Indiana Legislature could have enacted a similar exemption but did not; moreover, the Tennessee statute still applies to other actions based on injuries which develop long after initial exposure, including DES-related actions.

tiff's due process challenge. The Court recognized that there is a rational relationship between the Tennessee statute and the goals and purposes of the statute, including "the desire to encourage product manufacturers to provide goods without undue costs and risks, and to make product liability insurance more readily available . . . ." *Mathis* v. *Eli Lilly & Co.*, *supra*, slip op. at 10.

The reasonableness of statutes of limitations as applied in asbestosis claims was recognized by the Supreme Court of Indiana in *Bunker* v. *National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982). There the claimant argued the three-years-from-exposure statute of limitations for recovery of benefits under the Indiana Occupational Disease Act, Ind. Code § 22-3-7-9(e) (1974), violated due process. The court rejected the argument, noting that "considerable deference should be accorded the manner in which the Legislature has balanced the competing interests involved." *Bunker* v. *National Gypsum Co.*, 441 N.E.2d at 13. We are in accord with this view, and reject plaintiffs' due process argument.

II

Plaintiffs also contend that § 33-1-1.5-5 violates the equal protection clause of the Fourteenth Amendment. Plaintiffs focus upon the ten-year limitation provided by the statute, which requires that product liability actions be brought within ten years after the delivery of the product to the initial user or consumer. The crux of plaintiffs' argument is that the statute acts to create two classes of plaintiffs—those who discover their injury and bring an action within ten years of delivery, and those who do so after ten years and are thus time-barred—and that such a classification violates equal protection.

Plaintiffs' equal protection argument must also be rejected. In this action no fundamental right or suspect classification warranting strict scrutiny analysis has been identified; therefore the rational basis test is the proper one. See *Camille Corp.* v. *Phares*, 705 F.2d 223, 228 (7th Cir. 1983); *DiAntonio* v. *Northampton-Accomack*

Memorial, 628 F.2d 287, 291 (9th Cir. 1980). The objectives of § 33-1-1.5-5 are rational, as this Court commented in regard to this statute in *Pitts* v. *Unarco Industries, Inc.*, 712 F.2d at 280:

> The effect of this [statute] is to lessen the risk of loss—*i.e.*, from having to pay for injuries resulting from use of a defective product—manufacturers face when they place a product into a stream of commerce. That is a legitimate legislative purpose, and it is not the courts' business to instruct the Indiana legislature when it is better for consumers than producers to bear that risk.

Consistent with our decision in *Pitts* v. *Unarco Industries, Inc.*, *supra*, we hold that it is not a denial of equal protection to bar product liability actions brought later than ten years after the product was delivered to the initial user or consumer. See also *Scalf* v. *Berkel, Inc.*, *supra* (Court of Appeals of Indiana holding that the ten-years-from-delivery clause of § 33-1-1.5-5 does not violate equal protection).

III

Plaintiffs also contend that the district court improperly held that a cause of action for asbestosis accrues at the time of the most recent exposure to the asbestos fibers. Plaintiffs argue that a cause of action accrues not until there is ascertainable damage, and that generally this will be when the condition is diagnosed, unless it is shown that the plaintiff should have known of the injury at an earlier date. Although there is some dispute as to when some of the plaintiffs first became aware of their conditions, it is clear that at least some of the plaintiffs first learned of their asbestosis not earlier than late 1979. And all plaintiffs filed no later than July 2, 1981. Therefore, unless plaintiffs should have known more than two years prior to filing that they had asbestosis, under plaintiffs' interpretation of accrual the two-year rule found in § 33-1-1.5-5, as well as in § 34-1-2-2, would be satisfied as to some plaintiffs.

Plaintiffs' interpretation of the Indiana law of accrual, however, contradicts controlling precedent from the Supreme Court of Indiana. In *Shideler* v. *Dwyer*, 417 N.E.2d 281, 289 (Ind. 1981), that court held that a cause of action accrues "when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Shideler* was a malpractice case where the beneficiary of a provision in a will sued the attorney who drafted it because the provision was later declared invalid. The will was executed in October 1973, and the testator died in December 1973. The beneficiary did not receive payments due under the provision after November 1974. The provision was declared invalid on June 30, 1975 by the Probate Court, and the beneficiary sued the attorney on June 29, 1977. The attorney raised the two-year statute of limitations in Ind. Code § 34-1-2-2, contending that the cause of action accrued and the damage occurred when the testator died in 1973 and that the beneficiary's claim for malpractice was barred. The Supreme Court of Indiana agreed, holding that the damage occurred upon the testator's death, and that the statutory period of limitations began to run as of that date, and not on the date when the Probate Court declared the will's provision invalid. *Shideler* v. *Dwyer*, 417 N.E.2d at 290.

Thus the Supreme Court of Indiana rejected a "discovery" rule for the accrual of a cause of action, finding that, "[f]or a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damage be known or ascertainable but only that the damage has occurred." *Shideler* v. *Dwyer*, 417 N.E.2d at 289.

As this Court's duty is to apply Indiana law, we hold that the causes of action herein accrued not when the injuries were discovered or susceptible of ascertainment,[5]

[5] If we were free to write upon a clean slate, we might adopt the discovery rule whose adherents are growing. See *Neubauer* v. *Owens-Corning Fiberglas Corp.*, 686 F.2d 570 (7th Cir. 1982), certiorari denied, 103 S. Ct. 1233.

but rather at the time of the wrongful act, which the trial court reasonably concluded to be no later than the most recent exposure to asbestos fiber. Although Indiana courts have not explicitly held that the "wrongful act" or "impact" rule of accrual applies specifically in product liability actions against asbestos manufacturers, the *Shideler* court did cite with approval two New York decisions which applied such a rule in disease-related actions. In *Schwartz* v. *Heyden Newport Chemical Corp.*, 188 N.E.2d 142 (N.Y. 1963), amended on other grounds, 190 N.E.2d 253 (N.Y. 1963), certiorari denied, 374 U.S. 808, the plaintiff was injected with a radio-opaque dye which resulted in carcinoma thirteen years later. The New York Court of Appeals held that the plaintiff's claim accrued when the wrong occurred, *i.e.*, at the impact of injection, and not when the plaintiff discovered the injury. *Shideler, supra*, also cited with approval *Schmidt* v. *Merchants Dispatch Transportation Co.*, 200 N.E. 824 (N.Y. 1936), where it was held that the cause of action for a respiratory disease (pneumoconiosis) accrued when the plaintiff was exposed to the dust, not at the time when the dust so inhaled resulted in the disease, the latter date being estimable only by medical testimony.

Further, the Court of Appeals of Indiana has held that for purposes of the limitations period applicable under § 33-1-1.5-5, the action accrues not upon discovery, but rather at the time the plaintiff is harmed. *Wojcik* v. *Almase*, 451 N.E.2d 336, 341-42 (Ind. App. 1983). There a product liability action was brought against the manufacturer of a catheter, which is inserted in the chest to permit direct feeding of patients. The court held that since plaintiff filed more than two years after the harm occurred, *i.e.*, the breaking of the catheter within the patient, Ind. Code § 33-1-1.5-5 barred the action. See also *Monsanto Co.* v. *Miller*, No. 1-783 A 213 (Ind. App. Sept. 23, 1983) (rejecting the discovery rule).

The dissent seemingly overlooks the fact that the *Shideler* court invoked as primary support for its position and quoted at length decisions from other jurisdictions

which expressly reject the view that a cause of action does not accrue until the damage is susceptible of ascertainment. See *Schwartz* v. *Heyden Newport Chemical Corp.*; *Schmidt* v. *Merchants Dispatch Transportation Co.*, *supra*. As the Supreme Court of Indiana noted in regard to *Schmidt*, "the cause of action accrued when [plaintiff] inhaled the dust—more than three years before the action was commenced—not at the time when the dust so inhaled resulted in a disease of the lungs, which date could only be determined by medical testimony." *Shideler* v. *Dwyer*, 417 N.E.2d at 289. The *Shideler* court cited *Schmidt* for the rule of law that:

> The injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust. For that injury, including all resulting damages, the defendant was then liable. The disease of the lungs was a consequence of that injury. Its result might be delayed, or, perhaps, even by good fortune averted; nevertheless, the disease resulted naturally, if not inevitably, from a condition created in the plaintiff's body through the defendant's alleged wrong. It cannot be doubted that the plaintiff might have begun an action against the defendant immediately after he inhaled the dust which caused the disease. No successful challenge could have been interposed on the ground that the action was prematurely brought because at the time it was commenced no serious damage to the plaintiff had yet developed. In that action the plaintiff could recover all damages which he could show had resulted or would result therefrom.

Shideler v. *Dwyer*, 417 N.E.2d at 290 (quoting *Schmidt* v. *Merchants Dispatch Transportation Co.*, 200 N.E. at 827). In light of the Supreme Court of Indiana's above-stated position, it is difficult to conceive that, as the dissent suggests, plaintiffs in the instant action would have been "laughed out of court" had they brought an action within two years of the time they were exposed to the asbestos fibers.

These decisions construing the meaning of the "accrual" of a cause of action indicate that under Indiana law the causes of action herein accrued when plaintiffs were last exposed to the asbestos. Since none of the actions herein were brought within two years of the most recent exposure, we hold that the district court was correct in concluding that the actions were barred by the two statutes of limitations considered herein.

Since our holding on the constitutional and accrual issues is dispositive of the case, it is unnecessary to address the other issues raised by plaintiffs on appeal.

Judgment affirmed.

SWYGERT, *Senior Circuit Judge*, dissenting. Plaintiffs in this case are persons (and their spouses) who contracted asbestosis after long-term exposure to raw asbestos fibres in their workplace. The usual manifestation period for asbestosis is twenty to thirty years. *See* Deposition of Anthony Dowell, M.D., at 138, *Braswell* Record. Thus, in many instances an employee will have retired from employment and will have ceased to be exposed to asbestos fibres before the disease manifests itself. This is what happened to plaintiffs in this case.

To state the obvious, if an asbestosis claimant brought an action against manufacturers of asbestos before any manifestion of the disease, the claimant would be "laughed out of court," *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 323, 164 Cal. Rptr. 591, 595 (1980). On the other hand, if the claimant waits for the disease to manifest itself, the claimant, under the court's holding today, may be barred from bringing a claim by Indiana's statute of limitations. This result is a mockery of justice.

In diversity actions such as this, the federal courts cannot and should not substitute their judgment for that of the state courts on matters of state law. I do not believe

that the Indiana Supreme Court has conclusively declared the result announced by the majority in this case. Particularly when the result is as unjust as it is here, this court has a duty to avoid creating state law if possible. Indiana's certification procedure should be used to give the Indiana Supreme Court an opportunity to decide an important point of Indiana law which directly affects the ability of Indiana residents to recover damages for debilitating injuries.

I disagree with the majority's finding that *Shideler v. Dwyer*, 417 N.E.2d 281 (Ind. 1981), the only case in which the Indiana Supreme Court has addressed the issue of a discovery rule, necessarily governs the present case. In *Shideler* the court held that a cause of action against an attorney for malpractice in drafting a will accrued when the testator died. The court rejected plaintiff's contention that the action did not accrue until the probate court found that the provision for plaintiff was void. *Shideler* can be distinguished from the present case on at least three grounds.

First, the court in *Shideler* expressly noted the possibility of adopting a different rule in a case in which "the misconduct was of a continuing nature or concealed . . . ." *Id.* at 291. In *Shideler*, the defendant's alleged negligence arose out of the single action of drafting the will and that negligence was at least *capable* of discovery any time after the contents of the will were disclosed, which necessarily occurred upon the death of the testator, if not before. *See also Wojcik v. Almase*, 451 N.E.2d 336, 342 (Ind. App. 1983) (action against manufacturer of catheter that broke off in plaintiff's body).* In this case, plaintiffs

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* A decision of the Indiana Court of Appeals, an intermediate appellate court, is not binding on this court, but is relevant data entitled to "proper regard." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Garris v. Schwartz*, 551 F.2d 156, 158 (7th Cir. 1977).

complain of continued exposure to asbestos, the injury from which is not even capable of discovery in many instances on the date of last exposure.

Second, the holding in *Shideler* was expressly based, in part, on the particular relationship between plaintiff and defendant in the case: "We see no unique relationship between a lawyer who drafts a will and one who is merely the object of his client's bounty that calls for a special rule. Without more, there is no continuing obligation to the devisee." 417 N.E.2d at 291. The court recognized that a discovery rule may have "special merit" in other cases. *Id.* The court could find a discovery rule warranted in the case before us. Indiana is among the large number of states that have recognized special rules of liability for manufacturers. *See Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 92-93, 300 N.E.2d 335, 339-40 (1973); Ind. Code §§ 33-1-1.5-1 to 33-1-1.5-8. These rules of stricter liability exist, in part, because manufacturers are particularly able to bear the costs of compensation for injuries from their products. Certainly "large scale" enterprises such as asbestos manufacturers are in a better position than lawyers and doctors to absorb such costs. *See Magrine v. Krasnica*, 94 N.J. Super. 228, ___, 227 A.2d 539, 545 (Cty. Ct. 1967), *aff'd sub nom. Magrine v. Spector*, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969). Moreover, manufacturers of products such as asbestos are more likely to anticipate long-delayed injuries from their products than are lawyers and doctors from their services. *Cf. Raymond v. Eli Lilly & Co.*, 117 N.H. 164, ___, 371 A.2d 170, 176 (1977) (anticipation of long-delayed effects of drugs by drug manufacturers). For these reasons, the concern for repose, which the court stressed in *Shideler*, has much less appeal in claims against manufacturers than in claims against lawyers. *But see Wojcik v. Almase, supra*, 451 N.E.2d at 344 (rejecting discovery rule in claim against catheter manufacturer).

Third, some of the claims in this case, depending upon when they are deemed to have accrued, would be

governed by a different statute of limitations from the one applied in *Shideler*. Any actions that are deemed to have accrued after June 1, 1978 would be governed by Indiana's new products liability statute of limitations, Ind. Code § 33-1-1.5-5. *See id.* § 33-1-1.5-8(b). Under this statute, products liability actions must be brought within ten years from the date that the product was delivered to the initial user or consumer, *and* within two years from the date of accrual of the cause of action. If not brought within the ten-year outside limitation period, the action is time barred regardless of when it accrued. *See Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 210-11 (Ind. 1981). The action in *Shideler* was governed by Indiana's tort statute of limitations, Ind. Code § 34-1-2-2, which provides only a two-year accrual period. 417 N.E.2d at 288. The Indiana Supreme Court could reasonably find that the products liability statute's ten-year outside limitation period guarantees sufficient repose for manufacturers to permit the accrual period to be measured from the date of discovery of the injury. *But see Wojcik v. Almase, supra*, 451 N.E.2d at 341-42 (rejecting discovery rule in products liability action governed by Ind. Code § 33-1-1.5-5).

In sum, the Indiana Supreme Court might decline to apply a discovery rule in this case, but that result is not compelled by the court's holding in *Shideler*.

Most tort statutes of limitation were originally written and construed long before the advent of modern toxic diseases such as asbestosis. The California Court of Appeals, applying a discovery rule in a case involving an injury caused by the drug MER/29 that manifested itself sixteen years after the drug was last ingested, explained:

> The simple fact is that rules developed against the relatively unsophisticated backdrops of barroom brawls, intersection collisions and slips and falls lose some of their relevance in these days of miracle drugs with their wondrous, unintended, unanticipated and frequently long delayed side effects . . . . "[T]he response of the courts to advances in science and technology can be either to adhere rigidly to prior

doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." (*Sindell v. Abbott Laboratories* (1980) 26 Cal. 3d 588, 610, 163 Cal. Rptr. 132, 144, 607 P.2d 924, 936.)

Martinez-Ferrer v. Richardson-Merrell, Inc., *supra*, 195 Cal. App. 2d at 324, 164 Cal. Rptr. at 595. These rules are similarly irrelevant in cases involving latent diseases from toxic substances. Thus, many courts, following the logic of the California courts, have adopted discovery rules in latent disease cases. *See, e.g., Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 166-71, 421 N.E.2d 864, 866-68 (1981); *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979); *Harig v. Johns-Manville Products Corp.*, 248 Md. 70, ___, 394 A.2d 299, 304-06 (1978) (questions certified to state court by district court); *Hutchison v. Semler*, 227 Ore. 437, 446, 361 P.2d 803, 807, 362 P.2d 704, 704 (1961) (silicosis from exposure to silica dust); *Coyne v. Porter-Hayden Co.*, 286 Pa. Super. 1, ___, 428 A.2d 208, 210 (1981).

Indiana's two-year accrual period for actions for personal injuries dates back to 1881. 1881 Ind. Acts (Spec. Sess.) ch. 38, § 38, p. 240. The Indiana courts have never construed its meaning in a claim involving a latent disease such as asbestosis. The Indiana Supreme Court should be given an opportunity to follow the equitable lead of other state courts and to construe its state statutes to meet the changing needs of a modern, technologically advanced society. I would certify to the Indiana Supreme Court, pursuant to Ind. Code § 33-2-4-1, the questions: When does a products libability action against a manufacturer of asbestos for asbestosis caused by exposure to the manufacturer's product accrue under (1) Indiana's tort statute of limitations, Ind. Code § 34-1-2-2, and (2) Indiana's products liability statute of limitations, Ind. Code § 33-1-1.5-5?

Even assuming that the rule announced in *Shideler* governs this case, the majority misapplied that rule here.

In *Shideler*, the court held that a cause of action accrues when the injury to plaintiff occurs. 417 N.E.2d at 289. Contrary to the finding of the New York Court of Appeals that the injury in an asbestosis case is the inhalation of the asbestos dust, *Schmidt v. Merchants Dispatch Transportation Co.*, 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936),** the injury in such cases is the disease itself. *See*

** As the majority notes, the *Shideler* court quoted at length from this case and cited *Schwartz v. Heydon Newport Chemical Corp.*, 12 N.Y.2d 212, 216-17, 237 N.Y.S.2d 714, 717, 188 N.E.2d 142, 143-44 (1963), in which the New York Court of Appeals held that a cause of action to recover damages for cancer allegedly resulting from an injection of a radio-opaque dye accrued at the time the drug was injected rather than at the time the injury became apparent. I try to point out in this dissent other statements contained in the *Shideler* opinion and other decisions of the Indiana courts indicating that Indiana might not apply the New York rule in the present case despite this dictum in *Shideler*. I believe that the Indiana Supreme Court should be permitted to resolve these apparent conflicts. I should also note that even New York has moved away from its harsh rule in several instances. *See, e.g., Simcuski v. Saeli*, 44 N.Y.2d 442, 449, 406 N.Y.S.2d 259, 262, 377 N.E.2d 713, 716 (1978) (defendant estopped from raising statute of limitations as a defense to a tort action where defendant fraudulently concealed the tortious activity from plaintiff); *Flanagan v. Mount Eden General Hospital*, 24 N.Y.2d 427, 430-32, 301 N.Y.S.2d, 23, 26-27, 248 N.E.2d 871, 872-32 (1969) (adopting discovery rule in malpractice actions involving foreign objects left in patient's body); *Borgia v. City of New York*, 12 N.Y.2d 151, 155-56, 237 N.Y.S.2d 319, 321-22, 187 N.E.2d 777, 778-79 (1962) (statute of limitations for malpractice action stayed when course of treatment, which includes wrongful acts or omissions, has run continuously); N.Y. Civil Prac. Law § 214-b (1981 N.Y. Laws ch. 266, § 3) (enacting discovery rule for claims involving injuries from "Agent Orange"). *See generally Angie v. Johns-Manville Corp.*, 463 N.Y.S.2d 956, 957 (App. Div. 1983) ("a number of judicial decisions and legislative enactments designed to relieve to some degree the harshness of New York's general rule that a personal injury claim accrues at the time the injury or invasion of the body occurs, not at the time the injury was or could reasonably have been discovered").

Locke v. Johns-Manville Corp., 221 Va. 951, ___, 275 S.E.2d 900, 904-05 (1981); Vargo & Leibman, *Survey of Recent Developments in Indiana Law-Products Liability*, 12 Ind. L. Rev. 227, 253 n.184 (1979); *cf. Monsanto Co. v. Miller*, No. 1-783 A 213, slip op. at 5, 9-10 (Ind. App. Sept. 23, 1983) (injury from PCB in feed silo occurred and cause of action accrued under Indiana law when the level of PCBs in the herd's milk first reached an impermissible level, not when the contaminated silage was fed to plaintiff's herd); Ind. Code § 33-1-1.5-3 (products liability action requires "physical harm" to user or consumer). The date of inhalation of asbestos dust most closely corresponds to the date on which the lawyer in *Shideler* drafted the will; these were the points of time at which the defendants' last actions concerning or contacts with plaintiffs occurred. The court in *Shideler* expressly rejected the argument that the injury occurred and the cause of action accrued at this time. 417 N.E.2d at 290.

Under *Shideler*, plaintiffs' actions accrued when their asbestosis first "occurred." Although it may be difficult to determine when a progressive disease such as asbestosis first occurs, the date of last exposure is clearly irrelevant to that determination. *See Locke v. Johns-Manville Corp.*, *supra*, 275 S.E.2d at 905. Plaintiffs' asbestosis could have begun to develop any time before or after that date. Thus, even if *Shideler* is deemed to govern this case, the case must be remanded to the district court for determinations of the dates on which plaintiffs' injuries occurred. *See Monsanto Co. v. Miller*, *supra*, slip op. at 11 (remanded to district court for factual determination concerning when cause of action accrued).

Finally, I believe that the majority erred in failing to address the personal jurisdiction issue on appeal in this case. The district court held that it had no personal jurisdiction over defendants Flintkote Mines, Ltd. and Bell Asbestos Mines, Ltd. and dismissed plaintiffs' claims against these defendants. The district court held that the claims against Flintkote Mines, Ltd. were, in the alternative, time barred by Indiana's statute of limitations, but made

no alternative holding with respect to Bell Asbestos Mines, Ltd. The court made no findings of fact as to plaintiffs' last exposure to asbestos manufactured by Bell Asbestos. I believe that the court's jurisdictional holding was in error. In the absence of an alternative holding or findings of fact, the claim against Bell Asbestos must be remanded to the district court.

Indiana's long-arm statute, Ind. Trial Rule 4.4(A), subjects these defendants to the jurisdiction of the Indiana courts unless the exercise of jurisdiction would contravene the due process clause. *See Valdez v. Ford, Bacon and Davis, Texas, Inc.*, 62 F.R.D. 7, 14 (N.D. Ind. 1974); *Griese-Traylor Corp. v. Lemmons*, 424 N.E.2d 173, 180 (1981). The exercise of personal jurisdiction over these defendants raises no due process concerns.

This case is a far cry from *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), in which the Supreme Court held that an Oklahoma court could not exercise personal jurisdiction over a New York automobile distributor or dealer merely because it was foreseeable that plaintiff would drive his car into other states including Oklahoma. In this case, defendants knowingly transacted business on a continuous basis with Indiana companies and reaped the profits from these transactions.

In *Nelson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983), this court held that the Wisconsin courts had personal jurisdiction over a foreign manufacturer and distributor for injuries sustained in Wisconsin from one of their shirts. The manufacturer and distributor conducted all of their business in Hong Kong. The shirt in question was purchased from the distributor in Hong Kong by Woolworth, and placed in a Woolworth store in Wisconsin where it was ultimately bought by the mother of the injured child. The court refused to permit defendants to escape the jurisdiction of the Wisconsin courts by simply performing their sales transactions in a foreign jurisdiction. The manufacturer and distributor "were aware of the Woolworth distribution scheme and derived

economic benefit from selling the flannel shirts they placed into and moved along the stream of commerce. We conclude that [they] were participating in that distribution system such that they should reasonably anticipate being haled into court in a forum where the system brought a shirt that allegedly caused injury." *Id.* at 1127.

If the manufacturer and distributor in *Nelson* were subject to the jurisdiction of the Wisconsin courts, there can be no doubt that Flintkote Mines and Bell Asbestos are subject to the jurisdiction of the Indiana courts. They sold their products directly to Indiana companies, derived economic benefits from those sales, and must anticipate being haled into court in Indiana for injuries allegedly sustained there from their products.

For the foregoing reasons, I would certify the statute of limitations question to the Indiana Supreme Court, and would remand the claims against defendant Bell Asbestos Mines, Ltd. to the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 16, 1984.

Before

Hon. WALTER J. CUMMINS, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

ORVIL T. BRASWELL, et al.,	) Appeal from the United
	) States District Court for
Plaintiffs-Appellants,	) the Southern District of
	) Indiana, Indianapolis
Nos. 82-2699;	) Division.
82-2702 - 82-2705;	)
82-2727 - 82-2733.	) Nos. 79 C 996, 81 C 71,
	) 306, 363, 722,
vs.	) 162 and 369
	)
FLINTKOTE MINES, LTD., et al.,	) Cale J. Holder, Judge.
	)
Defendants-Appellees.	)

ORDER

On consideration of the petition for rehearing filed in the above-entitled caused by plaintiffs-appellants, a majority* of the judges of the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Judge Swygert voted to grant the petition for rehearing.

TABULATION OF STATES WITH CERTIFICATION STATUTE

Jurisdiction	Statutory Citation
Alabama	Ala. Const., art 6 Sec. 602.(b) Ala.R.App., P. 18
Colorado	Colo.App.R. 21.1
Florida	West's Fla.Stat. Ann. Sec. 25.031; Fla.App. R. 9.150
Georgia	Ga.Code Ann. Sec. 24-3902; Ga.Sup.Ct.R. 36
Hawaii	Haw.Rev.Sta. Sec. 602-5(2); Haw.Sup.Ct. R. 20
Indiana	Ind.Code Ann.1971, 33-2-4-1; Ind.App.R. 15(O)
Iowa	I.C.A. Secs. 684A.1 to 684.11
Kansas	K.S.A. Secs. 60-3201 to 60-3212
Kentucky	Rules of Civil Procedure, Rule 76.37
Louisiana	LA.SA-R.S. 13-72.1; La.Sup.Ct.R. 12
Maine	4 Me.Rev.Stat. Sec. 57; Me.R.Civ.P. 76B
Maryland	Code, Courts and Judicial Proceedings, Secs. 12-601 to 12-609
Massachusetts	Mass.Sup.Jud.Ct.R. 3.21
Minnesota	Minn.Stat.Ann. Sec. 480.061
Montana	Mont.Sup.Ct.R. 1
New Hampshire	N.H.Rev.Stat.Ann. 490; N.H.S.Ct.R. 21
New Mexico	N.M.Stat.Ann. Sec. 34-2-8
North Dakota	Rules of Appellate Proc., Rule 47
Oklahoma	20 Okla.Stat.Ann., Secs. 1601-1612
Puerto Rico	Supreme Court Rule 27 (4 L.P.R.A. App. I-A)
Rhode Island	R.I.Sup.Ct.R. 6
Washington	Wash.Rev.Code Ann. 2.60-010-2.60.900; Wash.R.App.P. 16.16
West Virginia	W.Va.Code, 51-1A-1 to 51-1A-12
Wisconsin	W.S.A. 821.01 to 821.12
Wyoming	Wyo.Stat. Secs. 1.193.1-1.193.4